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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 534

AMERICAN RESEARCH COUNCIL, INC. and BERNARD MAZEL,

Petitioners,

v.

ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Statement

The petitioner seeks a writ of certiorari to review a judgment of the New York Court of Appeals entered in this case on July 7, 1961, as amended by an order of that Court, dated October 5, 1961.

Opinions Below

The Supreme Court of the State of New York, New York County, wrote an opinion, which is not officially reported. 210 N.Y.S. 2d 332. The Appellate Division, upon affirmance, wrote a *per curiam* opinion, to which one justice dissented. 13 A. D. 2d 75, 213 N.Y.S. 2d 108. The New York Court of Appeals, upon reversal, wrote an opinion, three justices dissenting, which appeared in the official New York Reports in August, 1961. 10 N. Y. 2d 108, 176 N. E. 2d 402 (Appendix to the petition, pp. 12-35).

Jurisdiction

Jurisdiction is invoked under 28 U. S. Code § 1257(3).

Question Presented

The question which the petitioners seek to present is whether Article 23-A of the New York General Business Law (known as the Martin Act), as amended in 1960, violates the First and Fourteenth Amendment of the Constitution of the United States, if it is applied to permit an examination of witnesses by the New York Attorney General, to investigate whether fraudulent practices had been or were being employed in the promotion, advertisement and sale of a publication relating to an individual's dealings and methods of operating in the stock market.

The Statutes Involved

The sections of the Martin Act involved herein are General Business Law, §§ 352 and 354. Section 352 authorizes the Attorney General to investigate "any practice or transaction or course of business" relating to the sale of securities which is fraudulent or which he believes it to be in the public interest to investigate (Petition, pp. 31-32). Section 354 authorizes the New York Supreme Court to order persons mentioned in an application made by the Attorney General to appear before the court to answer questions or produce papers, documents or books concerning fraudulent practices as to which the Attorney General has determined to commence an action under the Martin Act (Petition, pp. 33-34).

Also referred to in the New York Court of Appeals opinion is General Business Law, § 359-eee (added by L. 1960, ch. 961), which defined "investment advisors", within the meaning of the Martin Act. The corporate

petitioner had been registered with the Securities and Exchange Commission as an "investment advisor" pursuant to the Federal Investors Advisory Act of 1940 (15 U.S.C., § 80-b). See the Appendix to the Petition for Certiorari (pp. 9-10).

Facts

The New York Attorney General sought to investigate certain practices engaged in by the petitioners in connection with the sale of a publication relating to the stock market practices of one Darvas. He obtained, pursuant to the usual procedure, an order of the New York Supreme Court dated December 7, 1960, permitting him to examine the petitioners (Petition, p. 26). That order was vacated, at petitioners' request, by the same Court (another justice presiding) by reason of the Court's erroneous assumption that the Attorney General's purpose was to suppress the book (Petition, pp. 30-31).

The Appellate Division recognized that there was no basis in the record for any concession that the Attorney General's aim was to suppress the book (Petition, p. 23). The Attorney General had denied any such purpose (90). But the Appellate Division held that the publication and its advertisements by the petitioners did not come within the purview of the General Business Law, §§ 352 and 359-eee being specifically mentioned (Petition, p. 22).

The Court of Appeals reversed, holding that the definition of "fraudulent practices" in the Martin Act was to be given a wide meaning to protect the public from deception. It defined broadly the scope of the Attorney General's powers under the statute (Petition, pp. 12, 15). It held that the New York lower courts had improperly applied to the Attorney General's "merely inquisitorial order" the measure of proof that would be required at a trial (Petition, p. 15). Compare *New American Library of W. L.* v. *Federal Trade Com'n*, 213 F. 2d 143 (2d Cir.,

1954), *Bantam Books, Inc.* v. *F.T.C.*, 275 F. 2d 680 (2d Circ., 1960), cert. den. 364 U. S. 819 (1960); and *Basic Books, Inc.* v. *F.T.C.*, 276 F. 2d 718 (7th Circ., 1960), where, under cease and desist orders, the Courts had occasion to review the *sufficiency of evidence* that misleading practices were being used in the sale of books.

ARGUMENT

No substantial federal question is presented by the petition. The judgment of the New York Court of Appeals merely sustained the New York Attorney General's power to investigate practices which he believed to be fraudulent in the advertisement, promotion and distribution of a publication being sold to the investing public. It did not purport to limit the petitioners' constitutional rights to publish works of fiction or autobiographical material.

The Court of Appeals did not sustain any suppression of the publication touted by the petitioners. Cf. *Koch* v. *Federal Trade Commission*, 206 F. 2d 311, 317 (6th Circ., 1953). It sustained the Attorney General's power to investigate the "practices, transactions and courses of business relating to the promotion, issuance and distribution of investment advice within and from the State of New York."

Although the petitioners urged that the order permitting the Attorney General to investigate would violate their First Amendment rights, there is nothing in the New York Court's order which reasonably could be understood to impose, as the petitioners assert (p. 7), any prior restraint upon the publication and distribution of books and writings; or to permit governmental control and suppression of ideas and beliefs. See *Trade Comm'n* v. *Education Society*, 302 U. S. 112 (1937), holding that laws may be made to protect the trusting as well as the suspicious.

CONCLUSION

The petition for certiorari should be denied.

Dated: New York, N. Y., November 15, 1961.

Yours, etc.,

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